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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 41120
Plaintiff-Respondent,)	
)	CANYON CNTY NO. CR 2012-27686
v.)	
)	
JOSE IBARRA,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

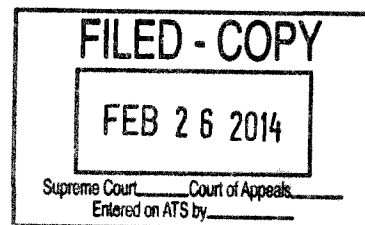
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	7
ARGUMENT	8
The District Court Abused Its Discretion By Allowing The State To Present Expert Testimony On The Subject Of Domestic Violence	8
A. Introduction	8
B. Applicable Jurisprudence	8
C. Dr. Bostaph's Testimony Regarding The Dynamics Of Domestic Violence Would Not Assist The Trier Of Fact In Understanding The Evidence Or In Determining A Fact In Issue	9
D. Alternatively, Any Probative Value In Dr. Bostaph's Testimony Was Substantial Outweighed By Its Prejudicial Effect	10
1. Dr. Bostaph's Testimony Allowed The Jury To Presume That The Ibarras Were Involved In An On-Going Violent Relationship	10
2. Dr. Bostaph's Testimony Allowed The Jury To Presume That Mr. Ibarra Posed An On-Going Threat To Ms. Ibarra's Life	11
E. The State Will Not Be Able To Prove The Error In Allowing Dr. Bostaph's Testimony Is Harmless Beyond A Reasonable Doubt	12
CONCLUSION	13
CERTIFICATE OF MAILING	14

TABLE OF AUTHORITIES

Cases

<i>Chapman v. California</i> , 386 U.S. 18 (1967)	12
<i>Fazzio v. Mason</i> , 150 Idaho 591 (2011).....	8
<i>Pope v. Illinois</i> , 481 U.S. 497 (1987)	12
<i>Rose v. Clark</i> , 478 U.S. 570 (1986).....	12
<i>State v. Almaraz</i> , 154 Idaho 584 (2013).....	8
<i>State v. Atkinson</i> , 124 Idaho 816 (Ct. App. 1993)	9
<i>State v. Perry</i> , 150 Idaho 209 (2010)	12
<i>State v. Sharp</i> , 101 Idaho 498 (1980)	12
<i>State v. Sheldon</i> , 145 Idaho 225 (2008).....	9
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	12
<i>White v. Mock</i> , 140 Idaho 882 (2004)	8

Rules

I.R.E. 401	8
I.R.E. 402	8
I.R.E. 403	9
I.R.E. 702	8, 9, 10

STATEMENT OF THE CASE

Nature of the Case

Jose Ibarra appeals from his Judgment and Commitment stemming from a jury verdict finding him guilty of felony domestic battery. Mr. Ibarra asserts that the district court abused its discretion by allowing the State to present expert testimony on the subject of domestic violence, as that testimony would not assist the jury and any limited relevance was substantially outweighed by the danger of unfair prejudice. Mr. Ibarra further asserts that the State will be unable to prove the error in admitting this testimony is harmless beyond a reasonable doubt.

Statement of the Facts and Course of Proceedings

The State charged Jose Ibarra by Information with one count of felony domestic battery (by causing traumatic injury), and one count of misdemeanor domestic battery (no traumatic injury).¹ (R., pp.25-26.)

Prior to trial, the State filed a document disclosing their intention to call an expert witness to testify about "Domestic violence, the dynamics of domestic violence, the effects of domestic violence, common characteristics of domestic violence, why victims often recant, dynamics of and causes for recanting, and other common characteristics relevant to these facts." (R., pp.61-62.) Mr. Ibarra filed a written objection to the State's proposed expert testimony arguing such testimony is intended to assist the jury in determining the alleged victim's credibility, and that "[t]here is no scientific, technical or specialized knowledge needed in order to evaluate the credibility of the witnesses in this

¹ The jury acquitted Mr. Ibarra of the misdemeanor domestic battery charge. (R., p.141.)

case. Issues of anger and why people might fabricate allegations are common to the human existence,” and the testimony would not assist the jury. (R., pp.64-65.) Mr. Ibarra continued by arguing that the testimony is not relevant as the proposed expert has no knowledge of the Ibarra’s relationship “or whether there exists a domestic violence relationship between the two.” (R., p.65.) Furthermore, Mr. Ibarra argued that any probative value in the testimony is outweighed by its prejudicial impact and that its only purpose would be to “cast a shadow on the alleged victim’s credibility as a witness and infer that the Defendant is an abuser.” (R., p.65.) Defense counsel further asserted Mr. Ibarra would be prejudiced by the evidence as “there is a high likelihood that the jury will infer from the expert testimony” that the Ibarra’s are in a “domestic violence relationship.” (R., p.65.)

During a pre-trial hearing on the proposed testimony, the State argued that “most jurors” don’t have “common knowledge” about domestic violence and “the reasons why some victims may minimize or recant” and “don’t often understand the cycle of violence ...”. (Tr. 3/14/13, p.7, L.9 – p.9, L.13.) On the contrary, defense counsel argued, “I do believe that the nature of humans, that people change their stories, may recant or change, that is exactly what human nature is, and that is not outside the realm of what an ordinary juror would comprehend or understand.” (Tr. 3/14/13, p.9, Ls.15-25.) Defense counsel further argued that there would be undue prejudice with such testimony as it would put into the minds of the jurors “that this is a domestic violence situation without any testimony regarding – without even knowing anything about the situation.” (Tr. 3/14/13, p.10, Ls.1-18.)

The district court found that, provided the appropriate foundation was laid, “expert testimony in this area ... is probably admissible” as such testimony would be

helpful to the jury. (Tr. 3/14/13, p.10, L.19 – p.11, L.11.) Although the court did not specifically articulate that it believed the probative value of the testimony is not outweighed by its prejudicial impact, the court stated, “[o]f course that opinion would be subject to vigorous cross-examination, presentation of contrary evidence, and clear instruction on the burden of proof and everything” and that the jury could put whatever weight on the testimony it deemed appropriate. (Tr. 3/14/13, p.11, Ls.11-20.)

At trial, Amber Ibarra testified that she and Jose Ibarra have been married since 2009, and have two children in common, but that they had been separated since the fall of 2012. (Tr. Trial, p.173, L.1 – p.174, L.19.) On Halloween night, she had plans to meet with Mr. Ibarra at her house around 6:30 or 7:00 to take the kids trick-or-treating but she was running late. (Tr. Trial, p.174, L.20 – p.175, L.21.) An angry Mr. Ibarra called her from a pay phone and told her that his car was broken down at the Nampa Winco and that she should meet him there, which she did. (Tr., Trial, p.175, L.22 – p.176, L.22.) When she arrived, Mr. Ibarra walked to her minivan and got in with her and three of her children. (Tr. Trial, p.177, Ls.1-20.) The two got into a verbal argument and the children asked them to stop fighting. (Tr. Trial, p.177, L.21 – p.178, L.17.) The Ibarras then got out of the car, Mr. Ibarra said that he wanted to “check” to see if Ms. Ibarra had been cheating, Ms. Ibarra said “go ahead,” and Mr. Ibarra stuck his hand down her pants.² (Tr., p.179, L.13 – p.181, L.5.)

Ms. Ibarra testified that she gave her cell phone to Mr. Ibarra, who made a phone call then put the phone in his pocket. (Tr. Trial, p.181, Ls.6-20.) Ms. Ibarra started

² This event was the subject of the misdemeanor domestic battery charge alleged in Count II, of which Mr. Ibarra was acquitted. (R., pp.26, 141.)

crying and asking for her phone back, but Mr. Ibarra refused to return it. (Tr. Trial, p.181, L.21 – p.182, L.3.) Ms. Ibarra described what happened next as follows:

He got in his car. And so I stuck my arm in the window trying to open the door, which it was locked and I couldn't get it opened. So I started grabbing his shirt, and he wouldn't give me my phone, and I did start scratching him and hitting him. And then he rolled the window up and drove off.

(Tr. Trial, p.182, Ls.15-23.) When he drove off, Ms. Ibarra ran alongside the car trying to get her arm out, she was able to do so, but her arm was bruised. (Tr. Trial, p.183, L.20 – p.184, L.9.) The next day, Ms. Ibarra went to the Family Justice Center in Nampa and eventually spoke with Officer Woodbury of the Nampa Police Department, and she told him generally what had happened; however, Ms. Ibarra did not tell him that she had scratched and hit Mr. Ibarra because she did not want to get herself into trouble, and she was not asked if she had done anything to harm Mr. Ibarra. (Tr. Trial, p.184, L.10 – p.192, L.21.) Ms. Ibarra also filled out a civil protection order and she admitted she did not reveal that she had scratched Mr. Ibarra in that document either. (Tr. Trial, p.194, L.10 – p.197, L.12.)

The State played audio recordings of phone conversations between Jose and Amber Ibarra in which Mr. Ibarra is heard asking Ms. Ibarra not to testify and to go and speak with Mr. Ibarra's attorney. (Tr. Trial, p.215, Ls.12-24, p.218, L.22 – p.219, L.20; Ex.6.) On cross-examination, Ms. Ibarra testified that she felt the prosecutor, not Mr. Ibarra, had been manipulating the process and that defense counsel was the first person to ask her whether or not she struck Mr. Ibarra. (Tr. Trial, p.220, Ls.1-18.) Ms. Ibarra further testified that after she freed her arm, she got in her car and followed Mr. Ibarra. (Tr. Trial, p.223, L.19 – p.224, L.5.) She testified that she did not believe that Mr. Ibarra battered her and that she believed he did not intentionally try and hurt her.

(Tr. Trial, p.224, Ls.11-18.) Ms. Ibarra testified that she feels safe around Mr. Ibarra and that she believes he was just trying to get out of the situation and did not try to hurt her. (Tr. Trial, p.226, L.19 – p.230, L.16.)

The State's next witness was Dr. Lisa Bostaph, their purported expert on domestic violence, and Mr. Ibarra again objected to her testimony. (Tr. Trial, p.231, L.12 – p.233, L.7.) Dr. Bostaph testified that common characteristics of domestic violence include physical violence, sexual violence and "psychological violence." (Tr. Trial, p.238, Ls.4-19.) She then described the "Circle of Violence or the Power and Control Wheel" between the "batterer" and the victim, and

...what holds the whole wheel together is this threat of physical violence, this threat that I'm going to hurt you, I'm going to hit you, I'm going to slap you, I'm going to beat you, or sexual violence. That's what holds this all together. If that threat of violence works, I don't have to use these. I don't have to hit you. If all these other tactics work, I never have to hit you. The threat of hitting you will be enough to control your behavior.

If those tactics don't work, then I have to – then I use violence, and they you understand that if I've hit you once because you didn't do what I said, then you know the next time when I tell you to do something, you'll do it, because you know that if you don't, I'll follow it up with hitting, because I've done it once, so why wouldn't I do it again.

(Tr. Trial, p.238, L.20 – p.240, L.21.) Dr. Bostaph then testified that victims of domestic violence are "generally fearful" of the batterer and make decisions based upon whether or not they are going to be beaten. (Tr. Trial, p.240, L.22 – p.241, L.24.) She testified that victims who report abuse get scared and decide that they need to "make it all go away" by recanting or saying they were at fault. (Tr. Trial, p.241, L.25 – p.243, L.9.) Dr. Bostaph testified that when victims leave such a relationship they are 7 to 15 times more likely to be murdered in the first few months. (Tr. Trial, p.243, L.10 – p.245, L.3.)

After the State rested³, Mr. Ibarra called as a witness his mother, Maria Ibarra, who testified that she saw “scratches with nails” on his face on November 1st of 2012. (Tr. Trial, p.252, L.19 – p.254, L.6.) Amber Ibarra was also called by the defense and testified that she did not feel intimidated during the phone calls that were recorded and played for the jury. (Tr. Trial, p.265, L.20 – p.266, L.12.) She further testified that she has never experienced domestic violence while she has been with Mr. Ibarra, although she did claim Mr. Ibarra had previously attempted to strangle her when she filled out an application for a protection order.⁴ (Tr. Trial, p.267, L.6 – p.268, L.13, p.270, L.12 – p.271, L.1.)

The jury found Mr. Ibarra guilty of felony domestic battery. (R., p.140.) The district court sentenced him to a unified term of ten years, with seven and one-half years fixed, and Mr. Ibarra filed a timely Notice of Appeal. (R., pp.159-165.)

³ The State’s first two witnesses were Officer Woodbury, who testified that he took the report from Ms. Ibarra and obtained a surveillance video of the incident from Winco, and Andrew Malloy, the Winco loss prevention person who provided the video to Officer Woodbury. (Tr. Trial, p.150, L.1 – p.169, L.24.) The State also played the surveillance video (Ex. 5) for the jury. (Tr. Trial, p.164, L.4 – p.169, L.24.) The video shows Ms. Ibarra running alongside of the car as Mr. Ibarra is driving away, but it is not clear whether her arm was stuck in the window as the camera was oriented towards the passenger side of the car as it started to move. (See Ex. 5.)

⁴ The jury was instructed that all testimony related to the protection order could only be considered as it weighed on Amber Ibarra’s testimony, and could not be considered as evidence of guilt. (R., pp.138-139.)

ISSUE

Did the district court abuse its discretion by allowing the State to present expert testimony on the subject of domestic violence?

ARGUMENT

The District Court Abused Its Discretion By Allowing The State To Present Expert Testimony On The Subject Of Domestic Violence

A. Introduction

Mr. Ibarra asserts that the district court abused its discretion when it allowed the State to present Dr. Bostaph's testimony on the subject of domestic violence, as her testimony was not helpful to the jury. Alternatively, Mr. Ibarra asserts that any limited relevance of Dr. Bostaph's testimony was outweighed by its prejudicial effect.

B. Applicable Jurisprudence

Idaho appellate courts apply an abuse of discretion standard when reviewing a lower court's decision to either admit or exclude evidence. *State v. Almaraz*, 154 Idaho 584, 591 (2013) (quoting *White v. Mock*, 140 Idaho 882, 888 (2004).) "A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason." *Id.* (quoting *Fazzio v. Mason*, 150 Idaho 591, 594 (2011).)

"'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Relevant evidence is admissible unless otherwise prohibited by the Rules of Evidence, while evidence that is not relevant is not admissible. I.R.E. 402. Idaho Rule of Evidence 702 governs that admissibility of expert testimony and states,

If scientific, technical, or other specialized knowledge **will assist the trier of fact to understand the evidence or to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702 (emphasis added). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” I.R.E. 403.

Whether evidence is relevant is a question of law that is freely reviewed. *State v. Sheldon*, 145 Idaho 225, 228 (2008). When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice, the abuse of discretion standard is applied. *State v. Atkinson*, 124 Idaho 816 (Ct. App. 1993).

C. Dr. Bostaph’s Testimony Regarding The Dynamics Of Domestic Violence Would Not Assist The Trier Of Fact In Understanding The Evidence Or In Determining A Fact In Issue

Amber Ibarra testified that she reached into the window of Mr. Ibarra’s car, tried to unlock the door, and scratched at Mr. Ibarra’s face, and that Mr. Ibarra rolled up the window and started to drive away, and she ran alongside the car while pulling out her arm, which caused bruises. (Tr. Trial, p.182, Ls.15-23.) She acknowledged that she told Officer Woodbury most of this information, but that she left out the part about her scratching at Mr. Ibarra’s face due to her not wanting to face charges herself. (Tr. Trial, p.184, L.10 – p.192, L.21.) While the recorded phone calls between the Ibarras showed that Mr. Ibarra encouraged Ms. Ibarra not to testify, there were no threats of violence associated with those calls. (Ex. 6.) Mr. Ibarra was charged with committing two crimes during one dispute – he was not charged with committing multiple acts of violence against Ms. Ibarra during multiple incidents. In short, the jury was not presented with evidence that the Ibarras were involved in any type of on-going, violence infused relationship. Therefore, Dr. Bostaph’s testimony about “[d]omestic

violence, the dynamics of domestic violence, the effects of domestic violence, common characteristics of domestic violence, why victims often recant, dynamics of and causes for recanting, and other common characteristics relevant to these facts” (R., pp.61-62), was not helpful to jurors, who would be more than capable of determining whether Mr. Ibarra was guilty based upon Ms. Ibarra’s testimony and impeachment thereof, and the other evidence presented. Therefore, Dr. Bostaph’s testimony was not admissible pursuant to I.R.E. 702, and the district court abused its discretion by allowing her testimony.

D. Alternatively, Any Probative Value In Dr. Bostaph’s Testimony Was Substantial Outweighed By Its Prejudicial Effect

Even if this Court were to determine that Dr. Bostaph’s testimony was helpful to the jury in some way and, therefore, relevant, the limited relevance was substantially outweighed by its prejudicial effect.

1. Dr. Bostaph’s Testimony Allowed The Jury To Presume That The Ibarras Were Involved In An On-Going Violent Relationship

The jurors were asked to decide whether Jose Ibarra was guilty of two acts of domestic battery that both allegedly occurred on the same day. The jury heard Dr. Bostaph testify about such issues as the “Circle of Violence” describing on-going patterns of abuse. (Tr. Trial, p.238, L.20 – p.240, L.21.) In light of Dr. Bostaph’s testimony, there is a substantial danger of unfair prejudice to Mr. Ibarra, i.e., the jury would assume that the reason they were hearing about the “Circle of Violence” is that the Ibarras’ relationship fell into such a category. There is a substantial danger that the jury would believe that Jose Ibarra held “the wheel” of their relationship together with threats and use of violence. The limited relevance that such testimony would have on

the issues the jury was actually asked to decide, was substantially outweighed by the danger that the jury would consider Dr. Bostaph's testimony as describing the Ibarra's actual relationship, and that they would render a verdict based, not upon the evidence actually presented, but upon the presumption that Mr. Ibarra is a "batterer" and he must be guilty. As such, the district court abused its discretion by permitting Dr. Bostaph's testimony.

2. Dr. Bostaph's Testimony Allowed The Jury To Presume That Mr. Ibarra Posed An On-Going Threat To Ms. Ibarra's Life

In addition to presuming that Mr. Ibarra had physically harmed Ms. Ibarra in the past, Dr. Bostaph's testimony allowed the jury to presume that Mr. Ibarra would commit violent acts against Ms. Ibarra in the future. Dr. Bostaph testified that when threats of violence do not work, and the victim defies the batterer, the batterer uses violence, up to and including murder, against the victim. (Tr. Trial, p.238, L.20 – p.245, L.20.) There is a substantial danger that the jurors, hearing this evidence, would presume that Mr. Ibarra would inflict such violence upon Ms. Ibarra because she defied him by testifying consistently with what she had initially told Officer Woodbury, i.e., that Mr. Ibarra rolled up the window and started driving away with her arm still in the window. The limited relevance of Dr. Bostaph's testimony was substantially outweighed by the danger that the jury would convict Mr. Ibarra for fear that, if they acquitted him and he was not punished by the legal system, he would harm or even kill Ms. Ibarra for having defied him in the first place. As such, the district court abused its discretion by permitting Dr. Bostaph's testimony.

E. The State Will Not Be Able To Prove The Error In Allowing Dr. Bostaph's Testimony Is Harmless Beyond A Reasonable Doubt

"To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman*. See *State v. Perry*, 150 Idaho 209, 227 (2010). In describing the *Chapman test*, the United States Supreme Court has held,

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993) (citing *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Clark*, 478 U.S. at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509–510 (1987) (STEVENS, J., dissenting).)

As noted in section D of this brief, and incorporated herein by reference, Dr. Bostaph's testimony was highly prejudicial and would lead a jury to conclude that Mr. Ibarra is the type of "batterer" that she described by the mere fact that such testimony was presented to the jury. The State will simply be unable to prove beyond a reasonable doubt that Dr. Bostaph's testimony did not contribute to the verdict.

CONCLUSION

Mr. Ibarra respectfully requests that this Court vacate his conviction and remand his case to the district court.

DATED this 26th day of February, 2014.

A handwritten signature in black ink, appearing to read 'J. Pintler', is written over a horizontal line.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

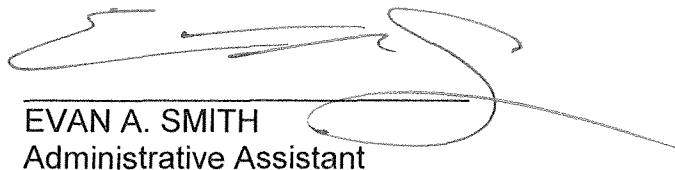
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